BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MISTINA L. KNIGHT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,035,527
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant appeals the December 6, 2007 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant's alleged injury of July 5, 2005, if it actually occurred, was "time-barred."[1]

Claimant appeared by her attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John C. Nodgaard of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held December 6, 2007, with attachments; and the documents filed of record in this matter.

ISSUE

Is claimant's alleged injury of July 5, 2005, time-barred? The ALJ, in his Order of December 6, 2007, found "that if the Claimant was injured on July 5, 2005, that claim is time-barred." No added clarification is contained in that Order. The ALJ does not explain

[1] ALJ Order (Dec. 6, 2007) at 1.

whether the time limit in question is the ten-day notice limit contained in K.S.A. 44-520, the 200-day written claim limit found in K.S.A. 44-520a or the two- or three-year application time limit contained in K.S.A. 44-534(b). However, as claimant's alleged date of accident is July 5, 2005, and claimant's E-1 Application For Hearing was filed on July 13, 2007, well within the three-year time limit, it would appear that is not the time limit being considered by the ALJ. Additionally, on the day after the alleged injury, claimant left a report of accident for respondent noting that claimant hurt her back on July 5, 2005, while "transferring a resident in ferguson unit".[2] Thus, it would appear that claimant has satisfied the 10-day time limit contained in K.S.A. 44-520 for the giving of timely notice. Finally, both claimant and respondent, in their briefs to the Board, focus on the written claim time limit contained in K.S.A. 44-520a. This Board Member will therefore determine whether claimant has satisfied the time limit requirements of K.S.A. 44-520a which requires an injured worker to submit written claim to his or her employer within 200 days of an alleged accident. However, as the ALJ did not determine whether claimant actually suffered an accidental injury on July 5, 2005, that issue will not be decided at this time.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant alleges that on July 5, 2005, while transferring a resident, she injured her back. Claimant did not tell her supervisor of the injury on that date. Instead, on the next day, July 6, 2005, claimant left an injury report (Report of Employee Injury)[3] on the desk at respondent's nurses' station. This report was found by an employee of respondent named Dana and then reported to claimant's supervising nurse, Jane Hall, R.N. Claimant did not request any medical treatment from or as a result of this incident. Claimant continued to work for respondent, missing no days as a result of this alleged incident.

Claimant continued working for respondent, while receiving medical treatment for several injuries and/or conditions over the next two years. Claimant was treated for a knee injury on July 24, 2005, underwent a CT scan for a cyst on her left ovary, was exposed to a possible HIV contamination on April 7, 2006, was treated for a left knee injury in June of 2006, and was provided medical treatment in December 2006 and January 2007 after being attacked by a patient. At no time, while being treated for these several maladies, did claimant discuss sustaining a low back injury on July 5, 2005.

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[2] P.H. Trans., Cl. Ex. 10 at 1.

[3] P.H. Trans., Cl. Ex. 10 at 1.

On June 21, 2006, without the knowledge of respondent, claimant sought medical treatment, on her own, with pain management specialist, Jon C. Parks, M.D. Claimant reported a two-year history of back pain with no work-related injury noted from July 5, 2005.

Claimant continued to work for respondent until May 6, 2007, when she fell off a chair while trying to retrieve a bug that had bitten her on the abdomen. Claimant suffered injuries to her left ankle and tailbone from this fall. On the day of the fall, claimant filled out another "Report of Employee Injury".[4] After this injury, claimant requested and was provided medical treatment.

Claimant hired a lawyer to pursue a workers compensation claim against respondent and filed an E-1 Application For Hearing on July 13, 2007.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[7]

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[4] P.H. Trans., Cl. Ex. 10 at 2.

[5] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 44-520a(a).

K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.[8]

Subsection (c) of K.S.A. 44-557 provides:

> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.[9]

K.S.A. 44-520a requires that an injured worker serve upon his or her employer written claim for compensation within 200 days of the accident or last payment of compensation, whichever is later. But under certain circumstances, the time limit for serving written claim is extended to one year. K.S.A. 44-557(a) requires an employer to report an accident to the Director of the Division of Workers Compensation within 28 days of receiving knowledge of an accident. No such report was ever filed with the Division. However, here, claimant filed her E-1 on July 13, 2007, over two years after the alleged date of accident. Thus, if the filing of the E-1 is the earliest date written claim was submitted in this case, it matters not whether respondent filed an accident report or not. Claimant would be out of time for written claim purposes.

Claimant alleges the "Report of Employee Injury" form constitutes a written claim for workers compensation purposes. The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate

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[8] K.S.A. 44-557(a).

[9] K.S.A. 44-557(c).

it.[10] The same purpose or function has been ascribed to the requirement for notice found in K.S.A. 44-520.[11] Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation or provide medical benefits as a result of the injury.[12] There is no indication that the "Report of Employee Injury" form left by claimant on the desk in the nurses' station the day after the alleged injury constituted a request for medical treatment. Claimant neither requested nor received any medical treatment for that alleged injury. This Board Member cannot find that claimant satisfied the requirements of K.S.A. 44-520a when she submitted that report. As the only other form which would constitute written claim for this injury is the E-1 filed over two years after the alleged accident, claimant has failed to satisfy the requirements of the statute and the denial of benefits by the ALJ should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant failed to provide respondent with timely written claim and her request for benefits from the alleged injury on July 5, 2005, is denied. The decision by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated December 6, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[10] *Craig v. Electrolux Corporation*, 212 Kan. 75, 510 P.2d 138 (1973).

[11] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[12] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 309 P.2d 681 (1957).

[13] K.S.A. 44-534a.

Dated this ____ day of March, 2008.

HONORABLE GARY M. KORTE

c: Roger A. Riedmiller, Attorney for Claimant
John C. Nodgaard, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge